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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 238.

CITIZENS SAVINGS AND TRUST COMPANY,
Appellant,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, BELLEVILLE AND SOUTHERN ILLINOIS RAILROAD COMPANY and ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,
Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Illinois.

BRIEF FOR APPELLEES.

J. M. DICKINSON,
BLEWETT LEE,
Counsel.

The Courier-Journal Printing Co.

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BRIEF FOR APPELLEES.

Statement of Facts.

The complainant, a Trust Company, in its capacity as a stockholder of the Belleville and Southern Illinois Railroad Company, hereinafter called the Belleville Company, on August 24, 1905, filed a bill in equity in the Circuit Court of the United States for the Eastern District of Illinois, against the Belleville Company, the Illinois Central Railroad Company, hereinafter called the Illinois Company, the St. Louis, Alton and Terre Haute Railroad Company, hereinafter called the

Terre Haute Company, and the United States Trust Company of New York, which last named company, however, was not served, for an accounting, seeking to cancel certain leases and conveyances covering the former railroad of the Belleville Company and praying incidentally for the appointment of a receiver. In what follows the references by page are to the printed record. The bill sets forth that the Belleville Company had formerly issued common stock in the aggregate of $100,000 par value to Perry County, Illinois, in return for certain bonds of that county (2); that by reason of failure to comply with the conditions imposed in the issue of the bonds of Perry County the bonds were declared invalid (3); that thereupon, at the suit of one Stebbins, a stockholder in the Belleville Company, the shares of stock owned by Perry County were cancelled (3); that thereafter the complainant as the owner of certain of the bonds of Perry County obtained a decree in the United States Circuit Court for the Southern District of Illinois, requiring the Belleville Company to issue to complainant an amount of its common stock proportional to the par value of the bonds of Perry County which had been declared invalid and were held by the complainant (4) amounting to 400 shares. The bill is brought on behalf of all stockholders who choose to join (4) and alleges that on October 1, 1866, the Belleville Company made a lease to the Terre Haute Company of the railroad property of the Belleville Company for a period of 999 years, upon the basis of a yearly rent based upon the gross earnings of the property (5). The bill further alleges that the Belleville Company has issued $1,275,000 preferred stock, en-

titled to receive 8 per cent. annual dividends before ever any dividends were declared upon the common stock, and that under the lease various dividends have been paid from time to time upon the preferred stock (6) and that if this lease had never been altered, under its terms enough rent would now be earned to pay dividends upon the common stock as well (7); that in 1895 the Illinois Company "fraudulently" for the purpose of procuring a railway of its own into East St. Louis acquired a sufficient number of the other shares of stock of the Belleville Company and of the shares of stock of the Terre Haute Company to control those companies (7) and caused on or about April 4, 1896, a new lease to be made dated October 1, 1895, for a term of 99 years (Ex. A, 19) whereby the railroad of the Belleville Company was leased to the Illinois Company under an annual rental, by which the Illinois Company agreed to pay the holders of the preferred stock of the Belleville Company an annual dividend of four and eight-tenths per cent. (4.8%), and also to pay the interest upon certain bonds of the Belleville Company (9); that this was not a fair rental for the properties (9); that subsequently, by reason of the control of the Terre Haute Company and the Belleville Company by the Illinois Company corporate action was taken (10) pursuant to which, on September 10, 1897, the Belleville Company conveyed its railroad to the Terre Haute Company in consideration of $1,400,000 of 4% bonds of the Terre Haute Company (Ex. B, 34) a consideration alleged to be grossly inadequate (11); that afterwards on September 15, 1897, the Terre Haute Company executed a supplemental indenture of lease, confirming the former lease dated

October 1, 1895, to the Illinois Company (Ex. C, 38). The bill further alleges (12) that on February 17, 1904, the Terre Haute Company conveyed all of its railroad properties to the Illinois Company (Ex. D, 46). It is also alleged that the annual interest of the $1,400,000 par value bonds of the Terre Haute Company is sufficient only to pay 4½% upon the preferred stock of the Belleville Company and is insufficient to pay anything upon the common stock (12); that the Belleville Company is under the control of the Illinois Company (13); that the Belleville Company has ceased to do business or file any reports with the Railroad and Warehouse Commissioners of the State of Illinois (13); that a demand upon the directors of the Belleville Company would be futile (14); that on September 15, 1897, the Illinois Company and the Terre Haute Company executed a deed of trust to the United States Trust Company of New York, securing an issue of $15,000,000 of Gold Bonds, and that among the properties conveyed were the ralroad properties formerly of the Belleville Company (14). The bill then sets out a long list of specific interrogatories, and concludes with a prayer (17) for a decree "cancelling and declaring forever void and of no effect the form of lease bearing date October 1, 1895" between the Terre Haute Company, the Illinois Company, and the Belleville Company, "so far as said indenture affects or purports to affect in any way the properties, franchises, rights or liabilities of the Belleville Company; cancelling and declaring forever void and of no effect the form of deed bearing date the 10th day of September, 1897," between the Belleville Company and the Terre Haute Company, "so far as said indenture af-

fects or purports to affect in any way the properties, franchises, rights or liabilities of the Belleville Company; cancelling and declaring forever void and of no effect the form of supplemental lease bearing date September 15, 1897," between the Terre Haute Company and the Illinois Company, "so far as said indenture affects or purports to affect in any way the properties, franchises, rights or liabilities of the Belleville Company; and cancelling and declaring forever void and of no effect the form of deed bearing date the 17th day of February, 1904," between the Terre Haute Company and the Illinois Company, "so far as said indenture affects or purports to affect in any way the properties, franchises, rights or liabilities of the Belleville Company; and that" the Belleville Company "be ordered to return and deliver up and account for whatever consideration it may have received under the aforesaid forms of deeds and leases to the party or parties from whom such consideration may have moved."

"And your orator prays a decree of this Honorable Court, ordering the defendant" the Illinois Company "to account for and pay over to" the Belleville Company, "or to a receiver to be appointed for said" Belleville Company, "such proportion of the yearly gross earnings as said" Belleville Company "is entitled to under the lease executed by and between" the Belleville Company and the Terre Haute Company, "bearing date October 1, 1866; such accounting to cover each fiscal year, or part thereof, from the time when" the Illinois Company "first acquired the railroad properties of the Belleville Company as lessee or sub-lessee under the lease executed on or about the

1st day of April, 1896, up to the time of such accounting."

"Your orator further prays an order appointing a receiver for" the Belleville Company, "with the usual powers of such receivers; and that" the Illinois Company, "through its officers and agents, to be ordered to surrender and deliver up to said receiver all the corporate assets, books, papers and everything that rightfully belongs to" the Belleville Company, "and that" the Illinois Company "be ordered to account to such receiver, as is hereinbefore prayed. That the defendant" the Illinois Company, "its officers and agents, be restrained from further violating the rights of your orator, and be ordered, directed and restrained in particular from interfering in any way with said receiver, or with the operation of said Belleville Company as an independent and separate railroad company; and for such other and further relief as the equity of the case may require and to your Honors may seem meet and just."

The attention of the court is called to the fact that while the Terre Haute Company is a party defendant, the bill does not pray a cancellation of the original lease by the Belleville Company to the Terre Haute Company, dated October 1, 1866, but prays instead that there shall be an accounting by the Illinois Company upon the basis of that lease (18). The Belleville Company (53), the Terre Haute Company (54), and the Illinois Company (55) each pleaded to the jurisdiction that it was not an inhabitant of the Eastern District of Illinois and did not reside therein, but that each defendant was a corporation organized under the laws

of the State of Illinois, and an inhabitant of the Northern Division of the Northern District of Illinois, residing therein at Chicago, where the corporate meetings of the defendant are held and its corporate business transacted. The complainant set down the pleas for argument (57). The court rendered a decree that the pleas were sufficient to deprive the court of jurisdiction, and "the court having looked into the bill of complaint of the complainant to determine if a local action is therein stated, doth consider, order, adjudge and decree that the facts in said bill stated and contained are insufficient in law or equity as grounds for setting aside or cancelling the several instruments therein described or either of them, and the said suit is not local to this district, and therefore" dismissed the bill for want of jurisdiction, with costs (57). The complainant moved to set aside this order (59) and at the hearing of this motion the court entered the following order (60):

> "It is ordered that the motion be allowed, as to so much of said decree as dismisses the suit for want of jurisdiction and leave is hereby granted complainant to file replication to said pleas, and the court finds that at the argument of the pleas to the jurisdiction set down for argument and heard on the 11th day of December, 1905, the defendants by their counsel contended that the question of the sufficiency of the bill was in issue the same as if a demurrer to a plea had been filed. The complainant objected to any argument of the merits of the bill and contended that sufficiency of the bill was not in issue. The court suggested a doubt whether the sufficiency of the bill was in issue, but permitted the defendants' counsel to argue the question of the sufficiency of the bill in order that such argument might be considered in case the court should conclude that the suf-

> ficiency of the bill was involved in the disposition of the pleas. Thereupon the defendants' counsel argued that the court ought to dismiss the bill for want of equity, but no motion to that effect was made by defendants."

The complainant then filed replications taking issue upon the pleas (61). Certain evidence was taken in open court upon the question of the inhabitancy and residence of the Illinois, Belleville and Terre Haute Companies, which will be found in the record beginning at page 63. In regard to the Belleville Company the evidence was that the last stockholders' and directors' meetings of that company were held in Chicago, and that the by-laws provided for the annual meetings of the company to be held there; that the books of the company are kept in Chicago (64); that the Belleville Company no longer operates a railroad, but that the railroad which it formerly owned extended between Belleville and DuQuoin, in Illinois (65); that the principal place of business of the Belleville Company was changed from Belleville, Illinois, to Chicago, in 1896 (68). The evidence in regard to the present by-laws, place of meetings and of the corporate books of Terre Haute Company is to the same effect (71) and the same is true in regard to the Illinois Company (73). It was brought out by complainant that the Belleville Company and the Terre Haute Company use the office of the Illinois Company. After hearing the evidence the court found that the companies named were at the commencement of the suit, and are, inhabitants of the Northern District of Illinois, sustained the pleas to the jurisdiction, and dismissed the bill for want of jurisdiction at the complainant's costs (74.) At page 79 of the record

appears a certificate that the order of dismissal "is based solely on the ground that this court, in its opinion, has no jurisdiction in this suit."

The Nature of the Bill.

From the foregoing statement of facts it appears that the bill is one to cancel a lease and supplemental lease and two deeds on the ground of fraud, for an accounting upon the basis of an earlier lease which would remain in force upon the cancellation of the instruments already mentioned, for the appointment of a receiver of the corporate assets of the lessor company, and for an injunction against interference with the operation of the lessor company as an independent and separate railroad company. Attention is called to the fact that there is no prayer for the operation of the railroad of the lessor company as a separate railroad by the lessor company, and that if all the relief prayed for in the bill were granted, the railroad formerly belonging to the Belleville Company would remain leased to another company and subject to the right of that company to possess and operate the railroad, so that the corporate assets which a receiver would receive, if appointed as prayed for in the bill, would not include the railroad property formerly owned by the Belleville Company.

The authorities generally upon the jurisdiction of equity over suits affecting real property in another state or country will be found collected in an elaborate note in 69 L. R. A., 673 (1905). Among the instances there collected of such jurisdiction are the creation and enforcement of trusts,

substitution of trustees, suits for specific performance, to remove cloud upon title, to cancel a void mortgage, foreclosure of mortgage or other lien, suits to redeem, to reform deeds, to have a deed declared a mortgage, for relief from fraud, for injunction, for accounting and incidental relief by requisition of conveyance, for partition, for appointment of a receiver, and other instances. The leading American case upon the subject is *Massie* v. *Watts*, 10 Cranch., 148, 158 (1810), in which suit was brought in the United States court for the District of Kentucky by a citizen of Virginia against a citizen of Kentucky to compel the latter to convey to the former 1000 acres of land located in Ohio on the ground that the defendant, while being the agent of the plaintiff, had obtained the issue of a patent to himself for lands which he ought to have located for the plaintiff. It was objected that since the lands were in Ohio the court was without jurisdiction. Chief Justice Marshall, in delivering the opinion of the court said:

> "Was this cause, therefore to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

This case was followed by Mr. Justice Story in *Briggs* v. *French*, 1 Sumn., 504, Federal Case No. 1870 (1833), a bill to set aside a fraudulent attachment and levy upon property situated in another state.

A court of equity will sustain a suit to discharge a cloud upon title to land situated in another state:

Remer v. *MacKay*, 35 Fed. Rep., 86, 87 (1888), in which Judge Blodgett clearly points out that the proceeding is *in personam* to compel the defendant to release or discharge a cloud upon the title.

As said by Mr. Justice Gray in *Hart* v. *Sansom*, 110 U. S., 151, 155 (1884):

> "Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agrement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. Langdell Eq. Pl. (2nd ed.), paragraphs 43, 184; *Massie* v. *Watts*, 6 Cranch., 148; *Orton* v. *Smith*, 18 How., 263; *Vandever* v. *Freeman*, 20 Tex., 334."

In *Montgomery* v. *United States*, 36 Fed. Rep., 4, 5 (1888), Judge Deady said:

> "This is not a local action to recover the possession of the land, but a transitory one to enforce the specific performance of a contract concerning the same. In such a proceeding a court of equity operates by its decree *in personam* on the defendants, and not *in rem*, on the subject-matter; and therefore it matters not whether the land which is the subject of the contract is within the territorial jurisdiction of the court or not."

In a suit by a telegraph company for the specific

performance of telegraph right of way contracts with certain railroad companies, where such companies are subject to the jurisdiction of the court, it is immaterial that a portion of the property is beyond the court's territorial jurisdiction.

W. U. Tel. Co. v. *C. C. & St. L. Ry. Co.*, 137 Fed. Rep., 435, 437 (1905). In this case Judge Kohlsaat quotes the following passage from *Phelps* v. *McDonald*, 99 U. S., 298, 308 (1878):

> "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decree against him.
>
> Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*."

In *Muller* v. *Dows*, 94 U. S., 444, 449, it is held that a federal court, sitting in one state has power to order the foreclosure of a railroad situated within two states, and it has been held by the Circuit Court of Appeals, Fifth Circuit, for the Western District of Texas, that a federal court of equity has power to foreclose a mortgage on a toll bridge, part of which is situated within the Republic of Mexico. *Int. Bridge & Tramway Co.* v. *Holland Trust Co.*, 81 Fed. Rep., 422 (1897), in which the court simply cite *Muller* v. *Dows*, as conclusive of the matter.

See, also, *Miller & Lux* v. *Rickey*, 127 Fed. Rep., 573, 579-580 (1904), in which a suit was entertained in the

United States Circuit Court for the District of Nevada to enjoin a diversion of waters in the State of California.

It has been held that a suit for specific performance of a contract to convey land must be brought in the district of the residence of the plaintiff or the defendant. The land was in Indiana, the plaintiff was a citizen of Illinois and the defendant a citizen of Kentucky. *Municipal Inv. Co.* v. *Gardner,* 62 Fed. Rep., 954 (1894). In this case the court said:

> "The present action is not local but transitory and does not seek any relief except a decree operating *in personam.* The bill is dismissed for want of jurisdiction."

This principle is perfectly well established and a vast number of cases might be collected from the state courts. Only a few will be cited, for the purpose of illustration.

In *State ex. rel. Campbell* v. *Superior Court,* 7 Wash., 300 (1893), it was held that a bill to enforce a trust in lands and compel an accounting was transitory. The court say:

> "That the enforcement of trusts and an accounting thereunder may be brought wherever the trustee can be found is well established by the authorities."

In *Johnson* v. *Gibson,* 116 Ill., 294 (1886), at page 301, an unusually luminous discussion by Mulkey, J., will be found, too long for quotation here, the court pointing out that "directing a conveyance of the property does not directly affect the title of the property, yet the enforcement of it does result in a complete change of title." The court "simply declares a cer-

tain transaction relating to land fraudulent as between the complainant and the offending parties, and thus removes an obstruction to the creditor's legal remedy."

In the case of *White Star Mining Co.* v. *Hultberg*, 220 Ill., 578, 599 (1906), it was held that the court had power to enforce specific performance of an arbitration award in relation to lands situated in Alaska. The court say:

> "In the case of *Alexander* v. *Tolleston Club*, 100 Ill., 65, we said (p. 77): 'It is well settled that courts of equity may decree specific performance of contracts respecting land situated beyond the jurisdiction of the state where the suit is brought. The ground of this jurisdiction, as said by Story, is, that courts of equity have authority to act upon the person; and although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land and compel him to perform his agreement according to conscience and good faith. * * * And in *Massie* v. *Watts*, 6 Cranch., 148, Chief Justice Marshall delivering the opinion of the court, it is laid down "that in a case of fraud, of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." ' To the same effect is the case of *Craft* v. *Indiana, Decatur and Western Railway Co.*, 166 Ill., 580. The court in the case at bar had jurisdiction of the parties by personal service and could enforce its decree *in personam*, and therefore had jurisdiction of the subject matter."

A court has jurisdiction to order the cancellation of a mortgage upon lands situated in another state.

Williams v. *Futzhugh*, 37 N. Y., 444, 449 (1868).

The fact that a receiver is asked for as an auxiliary remedy does not convert the action into a local one. This was held in *Ellis* v. *Reynolds*, 5 Fed. Rep., 394 (1888), a bill for an accounting and the appointment of a receiver. This is also the rule in case of a bill to administer a trust on lands part of which are situated outside the jurisdiction of the court, and a receiver may be appointed for the lands outside of the jurisdiction without converting the action into a local one. *Memphis Savings Bank et al.* v. *Houchins*, 115 Fed. Rep., 96, 108 (1902).

The Supreme Court of New York has power to direct a conveyance of lands situated in a foreign state to its receiver appointed in New York.

Bailey v. *Ryder*, 10 N. Y., 363, 370 (1852).

The English decisions, beginning with the time of Lord Eldon, are perfectly conclusive that the Court of Chancery has power to appoint a receiver of estates situated in foreign jurisdictions. In ..... v. *Lindsey*, 15 Ves. Jr., 91, a receiver was appointed of an estate in the East Indies. In *Hibbert* v. *Hibbert*, 3 Meriv., 681, a receiver was appointed of the real and personal estate of the testator in the West Indies. In *Houlditch* v. *Donegal*, 8 Bligh. N. R., 301, 2 Clark & F., 470, the question of this power of the Court of Chancery was bitterly contested in the House of Lords. The following extract is made from the opinion of the Lord Chancellor in 8 Bligh N. R., 343 (1834):

> "It is said that it is doubtful, if not deniable, that the courts of equity here can appoint a receiver in a foreign country, or a foreign state. The practice of the courts is strong against this doubt, and in favor of the affirmative of the propo-

sition. It is said that these cases passed *sub silentio*, and were not disputed; some of them certainly were disputed; in *Hibbert* v. *Hibbert* it was argued by counsel eminently qualified to deal with such a question, by Sir Arthur Pigott, a West Indian lawyer, as well as a great equity lawyer in this country; he puts his contention, and rests his resistance to the appointment of a receiver, not on the want of jurisdiction, but on another ground. So in the case of ..... v. *Lindsey*, it was suggested that it was every day's practice to grant these receivers. In the case of *Hibbert* v. *Hibbert*, Sir A. Pigott argues upon no such ground as denying the practice of the competency of the jurisdiction; he rests his resistance to the appointment of a receiver upon another ground. If he could have rested it upon the defect of jurisdiction, he would have done so, and Lord Eldon, the judge before whom he argued, would have recognized the practice. There are many other cases where the court has decreed a conveyance and a foreclosure of a mortgage; I mentioned one respecting Norman lands; and there is a case relating to the boundaries of lands in North America.

All these cases show that acting *in personam*, that is, through the medium of its power over the person, the courts of equity in this country mediately, though not immediately, affect the rights of real property abroad."

In this case, while the House of Lords fully vindicate the power of an English Court of Chancery to appoint a receiver of estates in Ireland, as will appear from an inspection of the decree (8 Bligh N. R., 349), the passage quoted from the opinion of the Lord Chancellor shows that such action was taken with a clear conception that the appointment of a receiver was based strictly upon a proceeding *in personam*.

It is to be observed also that so much of the prayer

as relates to the appointment of a receiver is merely ancillary to the principal relief prayed. There is no such thing as an equity to have a receiver appointed by reason of which the complainant is entitled to appeal to the jurisdiction of the court. Whether or not the suit is of a local character is to be determined by the equities of the bill, which plainly indicate it to be a bill for an accounting. These are the marks of a suit *in personam,* and the appointment of a receiver who is simply the custodian of the court, would not have the effect of converting what in its nature is a suit *in personam* into a suit *in rem.* If it were otherwise the entire protection afforded in the courts of the United States to defendants sued out of the district of which they are inhabitants could be swept away at any time by the simple device of adding at the close of the bill a prayer for a receiver. The fallacy of the reasoning which makes the present suit local would be all the more apparent if by chance the railroad of the Belleville Company ran through several states and federal districts. If such an action as the present were in its nature local in that event the complainant might be compelled to bring a local action *in rem* in every state or district instead of being allowed his relief by the simple and obvious remedy of a single suit *in personam.*

So far as the location of the assets of the Belleville and Southern Illinois Railroad Company is concerned, upon the showing made by the bill there is nothing but money, choses in action, books and papers to be put in the possession of the receiver, for the railroad is to remain leased. Under these circumstances, if the suit is local, the proper jurisdiction would be that where

the principal office is situated, where the books and papers are kept, and where the choses in action have their situs.

Indeed the bill shows upon its face that on October 1, 1866, the Belleville Company executed a lease of its railway properties to the Terre Haute Company for a period of 999 years (5) and whether or not the subsequent conveyance of its railway properties by the Belleville Company to the Terre Haute Company on September 10, 1897, was for an adequate consideration, it being alleged that the consideration was inadequate (11), in any event the deed by the Terre Haute Company to the Illinois Company of February 17, 1904 (12, Exhibit D, 46), would be effective to transfer the residue of the leasehold term of 999 years, together with a right of possession thereunder to the Illinois Company. To this deed of February 17, 1904, between the Illinois Company and the Terre Haute Company, the Belleville Company was not a party. In no event would the court be justified from any point of view in cancelling the deed, for it would thereby deprive the Illinois Company of the leasehold term of 999 years which in any event passed by this conveyance. The result of this reasoning is that although the bill indeed prays for a cancellation of everything except the lease between the Belleville Company and the Terre Haute Company and the $15,000,000 mortgage upon the property, executed to the United States Trust Company of New York, it appears on the face of the bill that the court ought not to grant a general cancellation as prayed, and if indeed the allegations of the bill as they stand would make out a right to the cancellation of any of the instruments whose cancella-

tion is sought by the complainant, such a cancellation would be strictly incidental and ancillary to the relief prayed of an accounting under the 999 year lease.

In so far as it is claimed in appellant's brief that under this bill the court could and would enforce an equitable lien upon the property of the defendant, the Illinois Central Railroad Company, an inspection of the bill will disclose that such relief would not be germane to its theory or scope. It appears by Article 19 of the complainant's bill (14) that there is already a trust deed upon the property to secure the issue of $15,000,000 of gold bonds. It is not alleged that the Illinois Central Railroad Company is insolvent or unable to respond to a money decree. The bill may be searched in vain for anything either in the allegations or prayer to justify a claim of equitable lien upon the property of the Illinois Central Railroad Company. No authorities are cited in support of such a proposition.

In order to determine whether the suit is really one "to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought" our only recourse is an inspection of the bill itself, and it is very clear that the bill is one for an accounting according to the terms of a certain lease, and incidentally for the cancellation of certain instruments and the appointment of a general receiver of corporate assets (17, 18). The incidental effect of granting all the relief prayed for in the bill might be to clear the supposed title of the Belleville Company to the railroad which it formerly owned, but this relief, like that

of appointing a receiver, would be ancillary only. As was said by Judge Acheson in the case of *Ellis* v. *Reynolds,* 35 Fed. Rep., 394 (1888):

> "The third prayer of the bill, indeed, is for the appointment of a receiver, but this is an auxiliary remedy, invoked as an aid to the principal relief sought. As the bill now stands, I do not see how the suit can be regarded as a proceeding *in rem,* within the contemplation of the act."

The essence of the bill is that a sufficient rental is not realized from the railroad formerly owned by the Belleville Company (6-7), and that the common stockholders are not getting any dividends and will not get any under present conditions. To the end that the common stockholders may get dividends, the bill prays that every instrument which stands in the way of that laudable end shall be cancelled, and an accounting rendered upon a basis which will make money for the common stockholders. The general cancellation of leases and conveyances is all for the purpose of an accounting at an adequate rental for the use of the railroad formerly belonging to the Belleville Company. Essentially the bill is one for an accounting and nothing else, and the suggestion that it is one to quiet title is an ingenious afterthought.

The third assignment of errors is as follows (78):

> "That it appears from the bill of complaint in this cause, that this is a suit brought to enforce 'an equitable lien upon, or claim to, or to remove an incumbrance or lien or cloud upon the title to real estate' within the Eastern District of Illinois, and comes within Section 8 of the Act of March 3, 1875 (18 Stat. L. 472) entitled 'An act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of

causes from State Courts, and for other purposes.' "

While it is possible that upon the facts alleged in the bill a suit might have been framed in such a way as to be a claim to real estate or to remove an incumbrance or lien upon real estate within the meaning of this statute, the complainant has not elected so to frame his bill. While it is alleged (14) that the railroad formerly of the Belleville Company has been made subject to a trust deed in favor of the United States Trust Company of New York to secure the issue of $15,000,000 of gold bonds, the complainant professes ignorance of the exact terms of this trust deed in spite of the fact that it is found in the same records as the other instruments which he has made exhibits in his bill. No offer is made to redeem from this mortgage and no relief is sought against the United States Trust Company of New York (18), nor has that defendant been served. The bill then is not one to remove an incumbrance or lien upon the title to real estate, nor is it a bill to remove a cloud upon the title to real estate. In order to file a bill to remove a cloud from title the complainant must be in possession of the premises.

Frost v. *Spitley,* 121 U. S., 552, 556 (1887).
Florida v. *Furman,* 180 U. S., 402, 428 (1901).

On the contrary, the bill shows that the railroad formerly of the Belleville Company is in the possession of the Illinois Company (8) and an inspection of the prayer (18) will show that it does not ask that the possession of the railroad be restored to the Belleville Company or to cancel the lease of October 1, 1866, by

which the railroad formerly of the Belleville Company was leased to the Terre Haute Company for a period of 999 years (5, 18). The bill, therefore, is not one to enforce a claim to real estate, nor is it one to enforce an equitable lien upon real estate. While the bill prays for an accounting upon the basis that the lease of the Belleville Company to the Terre Haute Company of October 1, 1866 is still in force (18), it also prays that the Belleville Company be ordered to return and deliver up and account for whatever considerations it may have received under the various deeds and leases since that time (18). Indeed the idea that the bill is one to enforce an equitable lien will appear so preposterous upon reading the bill that it is impossible to argue the matter seriously.

While it is perhaps too much to say that all the decisions upon the subject, especially in the lower Federal Courts, are reconcilable, an inspection of the cases which are cited by the complainant will, it is believed, disclose in every case that the bill as actually framed and upon the facts shown was really one to enforce "an equitable lien upon, or claim to, or to remove an incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought" instead of being, like the present suit, essentially one *in personam*.

The Authorities Cited by the Appellant.

Taking up the cases cited by complainant, that of *Jellenik* v. *Huron Copper Mining Co.*, 177 U. S., 1, 10 (1900) was a bill to remove a cloud upon the title of certain shares of stock, and was held properly brought

in the state in which the corporation was organized, and the district where its principal office was situated.

Goodman v. *Niblack*, 102 U. S., 556, 563 (1880) was a proceeding to enforce a lien upon a fund within the jurisdiction of the court.

McBurney v. *Carson*, 99 U. S., 567, 570 (1878), was a mortgage foreclosure.

The case of *Mellen* v. *Moline Malleable Iron Works*, 131 U. S., 352 (1889), held that a bill to foreclose a trust deed and chattel mortgage and a cross-bill to set those instruments aside and subject the property to the payment of creditors fell within Section 8 of the Act of March 3, 1875. It is very obvious that the proceeding was one to enforce a legal or equitable lien, a claim to certain real and personal property situated in the District on the one hand, and a proceeding to remove the lien and enforce another legal claim upon the same property on the other. As was said by Mr. Justice Harlan at page 366:

> "The trust deed and chattel mortgage executed by the Iron Works created a lien upon the property in favor of Wheeler, Carson, Hill, and the Keator Lumber Company, superior to all other creditors. The Furnace Company, in behalf of itself and other unsecured creditors, as well as Wheelock, denied the validity of Hill's lien as against them. That lien was therefore an incumbrance or cloud upon the title, to their prejudice."

Greeley v. *Lowe*, 155 U. S., 58 (1894), was a bill for the partition of real estate of which the plaintiff was in possession, praying in the alternative for a sale of the lands (page 60). As said by Mr. Justice Brown, at page 74:

> "The bill in question is one for the partition of land, wherein plaintiff avers that he is seized as tenant in common of an estate in fee simple, and is in actual possession of the land described, and after setting forth the interests of the other tenants in common, and alleging that no remedy at law exists to enable him to obtain his share of said lands in kind, or of the proceeds if sold, and that he is wholly without remedy except in chancery, prays for the partition of the land, and the segregation of his own share from that of the others, and incidentally that certain deeds may be construed, and, if invalid, may be cancelled, and that he may recover his advances for taxes and expenses. This is clearly a bill to enforce a claim and settle the title to real estate."

Taking up the cases cited by the complainant in the lower Federal Courts in chronological order, *Castello* v. *Castello,* 14 Fed. Rep., 207 (1882), was a bill to remove a cloud from the title of a widow to her lawful share of her husband's estate on account of an instrument she had been fraudulently induced to sign. As said by District Judge Krekel at page 209:

> "Looking at the object of the bill it mainly seeks to remove a lien or cloud upon her interest in the estate and property of her husband."

East Tennessee, V. & G. R. Co. v. *Atlanta & F. R. Co.,* 49 Fed. Rep., 608 (1892), was a bill based upon a section of the Georgia Code, to seize certain property and sell it. This is clearly of a local character. It was said by District Judge Spear (616-617):

> "It is insisted, however, by the learned counsel for the plaintiff that this is not a suit of a local nature, within the meaning of the act of congress. To this proposition the court cannot assent. We are controlled by the averments of the bill. It alleges that the defendant corpo-

ration is insolvent; that the plaintiffs are creditors; that the only means by which they can obtain payment of their debts is by the seizure of the railroad itself,—the *res*,—which is the subject-matter of this litigation. This railroad is mainly real estate, and is an entirety. A large part of it is actually located within this district. In so far as the assets are personal, they are likewise largely located here. It is therefore a suit of a local nature, and the fact that a portion of this entirety is in the northern district of Georgia does not affect the local character of the suit. The statute of the state code (section 3149a) gives to the plaintiffs an equitable right to subject this property to the payment of their debts, which right, it has been repeatedly held, a court of equity of the United States can enforce. To do this, it is necessary for a receiver of the court to take actual possession of the *res*, to control and administer it, and to do this in the locality in which it is situated. The character of the suit is not doubtful."

Upon the point that a railroad corporation is a resident of the entire state and an inhabitant of all the counties through which the road runs, this case was subsequently overruled by the Supreme Court of the United States, as will appear under another heading.

McGee et al. v. *Marietta & N. G. R. R. Co.*, 48 Fed. Rep., 243 (1891), was a bill to enforce liens arising in the construction of a railroad, by sale of the railroad and a distribution of the proceeds.

Single v. *Scott Paper Mfg. Co.*, 55 Fed. Rep., 553 (1893), was a suit for the specific performance of a contract for the conveyance of land by the plaintiff who was in possession of the land and had made valuable improvements, and the court in determining

whether or not the suit was one to enforce an equitable claim to real estate took into consideration certain statutes of Ohio by virtue of which the judgment of the court would have the effect of a conveyance of the property (p. 557).

Evans v. *Charles Scribner's Sons,* 58 Fed. Rep., 303 (1893), was a suit to procure the cancellation of a deed on the ground of fraud. So far as appears, the plaintiff may have been in possession of the property and the decision of District Judge Newman may have been based upon the idea of a bill to remove a cloud upon title. The report is meagre.

Cowell v. *City Water Supply Co.,* 96 Fed. Rep., 769, 770 (1899), was a bill to set aside a foreclosure and judicial sale, cancelling the mortgages upon which it was based, and establishing the plaintiff as the owner of an undivided interest in the mortgaged property. Manifestly this suit was properly brought in the court which had foreclosed the mortgage and it was to enforce a claim to the property itself.

McLaughlin v. *McCrory,* 55 Ark., 442 (1892), was a suit to cancel a fraudulent deed, and revest title in the complainant, and relies upon the Arkansas Statute authorizing the passing of title by decree of the court without any act to be done on the part of the defendant.

Adams v. *Cowles,* 95 Mo., 501 (1888), was in relation to a bill to remove a cloud upon title.

Acker v. *Leland,* 96 N. Y., 383, 386 (1884), was a suit to set aside a fraudulent assignment, for a sale of the assigned property, and a payment of the plaintiff's claim out of the proceeds thereof.

Chapin v. *Doods,* 104 Mich., 232 (1895), was a suit by an assignee of an insolvent debtor to set aside fraudulent conveyances of land. It must be borne in mind that the purpose of the proceeding was to acquire property and distribute it among creditors.

McKenzie v. *Bacon,* 38 La. Ann., 764, 765 (1886), was an action for the possession of real property.

Markham v. *Powers,* 9 S. W., 255 (Ky., 1888), was a bill to sell, in satisfaction of a judgment, land fraudulently conveyed.

Quarl v. *Abbett,* 102 Ind., 233, 234 (1885), was a case of the attachment of shares of stock of a non-resident, which were alleged to have been fraudulently transferred.

Lane v. *Innes,* 43 Minn., 137, 139 (1890), was a suit by an assignee to set aside a fraudulent conveyance by a bankrupt, in order that the proceeds might be applied to the satisfaction of creditors.

It is conceived that none of these cases are authorities against the position of the appellees.

No General Appearance Was Entered.

The fourth assignment of errors is as follows (78):

"That by demanding the right to argue, and by arguing the merits of the bill of complaint on the 11th day of December, 1905, in open court, and by arguing at said place and time that the court should dismiss said bill of complaint on the merits, the solicitor representing the defendants" the Illinois Company, the Belleville Company and the Terre Haute Company, "thereby entered a general appearance on behalf of said defendants, and

thereby waived the right of said defendants to be sued only in the Northern District of Illinois, if any such right exists."

Just what took place on this occasion is shown by the record on page 60, in the order of December 28, 1905, from which the following quotation is made:

> "The court finds that at the argument of the pleas to the jurisdiction set down for argument and heard on the 11th day of December, 1905, the defendants by their counsel contended that the question of the sufficiency of the bill was in issue the same as if a demurrer to a plea had been filed. The complainant objected to any argument of the merits of the bill and contended that sufficiency of the bill was not in issue. The court suggested a doubt whether the sufficiency of the bill was in issue, but permitted the defendants' counsel to argue the question of the sufficiency of the bill in order that such argument might be considered in case the court should conclude that the sufficiency of the bill was involved in the disposition of the pleas. Thereupon the defendants' counsel argued that the court ought to dismiss the bill for want of equity, but no motion to that effect was made by defendants."

The authority relied upon at the argument of the pleas was the following:

> "The sufficiency of the bill as to substance is also tested when the plea is set down for argument; but it has been said that the allegations therein are not taken as strictly against the complainant as in case of a demurrer."
>
> Foster's Fed. Prac., 3d Ed., Vol. 1, Sec. 140, p. 331.

To the same effect is the following:

> "[By setting down a plea for argument] the sufficiency of the bill as to substance is tested, al-

though its allegations are not taken as strictly against the complainant as in case of demurrer."

Beach Mod. Eq. Pr., Paragraph 326 (1894), both citing *Rumbold* v. *Forteath*, 2 Jur. (N. S.), 686, which will be found to support the text.

The following citation is added:

"Upon a familiar principle of pleading, the demurrer to the plea presents the question of the sufficiency of the bill, as well as of the plea itself. Is the bill sustainable on the facts as admitted by the pleadings? If this question is answered in the negative, it is clear that the demurrer to the plea must be overruled."

Beard v. *Bowler*, 2 Fed. Cas., 1171, Case No. 1180; 2 Bond, 13 (1866).

The court had a doubt as to whether or not the merits of the bill ought to be considered, but permitted argument in order to consider it in case the court found the merits of the bill were open to examination in the state of the pleadings. Since no motion was made to dismiss the bill, and argument on the merits of the bill was made for the purpose of being considered only in the event the court should think that the merits of the bill were open to examination, and such argument was received by the court only for the purpose indicated, the contention that the defendants' solicitor thereby entered a general appearance does not seem to merit very serious discussion. The defendants never appeared in court as moving parties and their solicitor in his argument addressed himself only to the issues which appeared to be open upon the state of the pleadings, and his argument of the merits of

the bill was made only for the purpose that the court should consider it in case the court should be of the opinion that it was the court's duty to rule upon the merits of the bill.

The filing by the defendant in a state court of a petition to remove the cause to the proper Circuit Court of the United States is not a general appearance, although the defendant may not in his petition have restricted the purpose of his appearance in the state court.

Wabash Western Ry. v. *Brow,* 164 U. S., 271 (1896).

In *Thomson* v. *McMorran Milling Co.,* 132 Mich., 591, 94 N. W., 188, 191 (1903), the defendant filed a special appearance moving to quash service and to strike out a suggestion of damages in an action of ejectment, upon the ground that service had not been made upon the agent of the defendant, and also that the court had lost jurisdiction of such a suggestion. It was claimed that this constituted a general appearance. The court held that service was not made upon the proper agent, and disposed of the question of general appearance as follows:

> "We are not convinced that the other point is well taken, but think that it should not be passed upon on this record. It is urged that by raising that question the defendant waived the question arising over the service. It is clear that such was not the intent of defendant's counsel, and, if it be true that the court had jurisdiction over the subject-matter, the motion to strike the suggestion should not be treated as equivalent to an appearance."

It must be manifest to the court from an inspection

of the bill and briefs that it is impossible to determine whether or not the suit is in its nature a local one without a detailed consideration of the nature of the bill and the equities upon which it bases itself. In order to deal with the plea to the jurisdiction it is indispensable that the court should consider at least for that purpose the equities of the bill. It would be proper to point out that complainant is not in possession, therefore the bill cannot be considered a bill to remove a cloud upon title; that the complainant does not set up any legal or equitable lien, therefore the bill is not for a foreclosure; that the bill does not claim possession of the railroad; that the bill is not to remove any incumbrance or lien upon the title, no offer of redemption being made, and the like. Counsel had the right in order to determine the nature of the suit to take up the various theories as to the nature of the bill upon which it was likely the jurisdiction of the court might be based, and to show, if they could, that the bill was not based upon the equity claimed, and if it should turn out that none of the theories upon which the complainant attempted to explain his bill could be supported, why so much the worse for the bill. If the court was in doubt whether or not, upon the state of the pleadings, he ought to consider the merits of the bill, and desired to hear argument upon the merits of the bill to be considered by him only in the event that he should conclude that he ought to rule thereon, it would not be fair to penalize the defendants for addressing themselves in their argument to all those questions which might in the opinion of the court be proper for consideration in the state of the pleadings. In deciding what constitutes a general appearance, the

principles of intention and of fair play ought to be followed, and a person ought not to be considered to have entered a general appearance where evidently he did not intend to do so and where considerations of fair play do not require that he should be treated as if he had entered a general appearance whether he intended to do so or not. In the present case, fair play works in favor of the defendants and not against them, and to hold that by what took place they have entered a general appearance would be simply to catch them in a trap.

Certainly an expression by the court below in its order ruling upon the question of jurisdiction that the bill was in fact without equity cannot prejudice the defendants, the ruling having been confined to the point of jurisdiction and having indeed been subsequently set aside upon the application of the complainant to be allowed to take issue upon the pleas to the jurisdiction.

The Defendants' Place of Inhabitance.

The privilege set up by the defendants is that of Section 1 of the Act of August 13, 1888, Ch. 866 (25 Stat. L., 434), in which referring to the Circuit and District Courts of the United States, it is provided:

> "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the appellant's assignment of errors no error is assigned for sustaining the plea to the jurisdiction, based upon the provision just quoted, of the Illinois Company, but error is assigned upon the overruling of the pleas of the Belleville and Terre Haute Companies. The evidence is undisputed that the last stockholders' and directors' meetings of each of these companies were held in Chicago in the Northern Division of the Northern District of Illinois; that the by-laws of each of these companies provide that the annual meetingsof stockholders shall be held there, and that the books of the company are kept in Chicago (64, 65, 72), while as conceded in the bill the Illinois Company is in possession of and operating the railroads formerly owned by the Belleville and Terre Haute Companies by virtue of the leases and subsequent conveyances in fee, set out in the bill. Under these circumstances, the authority of the case of *Galveston H. & S. A. R. Co.* v. *Gonzales,* 151 U. S., 496 (1894), is controlling. This case overruled a number of cases in the lower Federal Courts, including *Guinn* v. *Iowa Central Ry. Co.,* 14 Fed. Rep., 323 (1882), cited by the appellant.

In *Galveston, H. & S. A. R. Co.* v. *Gonzales,* 151 U. S., 496 (1894), a suit brought by a Mexican against the railway company in the United States Circuit Court for the Western District of Texas where it had a railroad and offices, the defendant appeared specially and pleaded in abatement that its principal office, habitat and domicile were in the Eastern District of Texas. The court held that there was a distinction between being a citizen of the state and an inhabitant of the district.

The court said (page 504):

> "In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its *corporate* business is transacted. even though it may transact its most important business in another place. It is but a corollary of the proposition laid down in the three cases above referred to, that if the corporation be created by the laws of a state in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done."

It was held that the plea should have been sustained.

In the case of *United States* v. *Southern Pacific R. Co., et al.*, 63 Fed. Rep., 481 (1894), the court said:

> "It is the established law that a corporation organized in one of the United States, and in that state only, cannot be considered a citizen, an inhabitant, or a resident of any other state, and that a corporation created by a state in which there are two or more judicial districts is to be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is transacted." (page 482.)

In the case of *A. L. Wolff & Co.* v. *Choctaw, O. & G. R. Co., et al.*, 133 Fed. Rep., 601 (1894), citizens of Missouri, in the United States Circuit Court for the Eastern District of Arkansas, sued a corporation chartered by Congress and having its principal office in Indian Territory, and an Illinois corporation. Both of the defendants did business in the state and district where the suit arose. Demurrers objecting to the juris-

diction by the defendants were sustained and the cause dismissed. The court relied upon the case of *Galveston, etc., Railway Co.* v. *Gonzales,* 151 U. S., 496. The second and third head notes (by the court) are as follows:

> 2. "An action against a corporation created by an act of Congress is one arising under the laws of the United States, and under the Act of March 3, 1887, c. 373, 24 Stat., 552 (U. S. Comp. St., 1901, p. 508), can only be maintained in a federal court of the district of which it is an inhabitant (*i. e.,* has its principal offices and transacts its corporate business), regardless of the residence of the plaintiff."
>
> 3. "A corporation is an inhabitant of the state and district in which its principal offices are, and its corporate business is transacted. The fact that it is doing business in a state or district other than that in which it has its residence, although it has, in compliance with the laws of such other state, consented to be sued in its courts, and for that purpose appointed an agent upon whom legal process may be served, does not make it an inhabitant of such other state or district, within the meaning of the act of March 3, 1887, c. 373, 24 Stat., 552 (U. S. Comp. St., 1901, p. 508)."

It is suggested that in changing the place of business of the Belleville Company, there has been a failure to comply with the Illinois Act of March 26, 1873, as amended by the act approved June 6, 1889, to be found in Hurd's Revised Statutes of Illinois, 1905, Ch. 32, sections 50, *et seq.,* beginning at page 507, which provides:

> "That whenever the board of directors, managers or trustees of any corporation existing by virtue of any general or special law of this state, or any corporation hereafter organized by virtue of any law of this state, may desire to change the

> name, to change the place of business, to enlarge or change the object for which such corporation was formed, to increase or decrease the capital stock, to change the number of shares of capital stock, to increase and decrease the par value of shares of capital stock, to increase or decrease the number of directors, managers, or trustees, or to consolidate said corporation with any other corporations now existing or which may hereafter be organized, they may call a special meeting of the stockholders of such corporation;" etc.,

making provision for a special notice to stockholders by mail and by publication, requiring a two-thirds vote of all the stock of the corporation and the filing of a certificate showing the change in the office of the secretary of state, and also publication in a newspaper of a notice of such changes of organization. As pointed out by the court below, at the argument of the plea, the question whether or not the defendant has complied with the law in changing its principal place of business is one between it and the state only, and if in fact the principal office and the only office of the defendant in question is in Chicago, the court cannot inquire, upon the issue raised by the plea, as to whether or not the proper formalities were complied with in order to locate the office there. If the defendant has acted unlawfully it is answerable to the state for its unlawful action but not to this complainant, and the legality of the change of office is not subject to be attacked collaterally by one of its stockholders upon an issue as to the actual inhabitancy of the defendant.

> "A most important doctrine connected with this subject, and one which rises above the mere principle of estoppel, is that whether a corporation has acted without authority conferred on it by the legislature or has acted in contravention to an act

of the legislature, cannot be set up collaterally by individuals who deal with it, or by third persons, but can be set up only by the state, in a direct proceeding to forfeit its charter, to oust it of some particular franchise, or to subject it to punishment; or where the question is otherwise litigated between the state and the corporation."

Seymour D. Thompson, in 10 Cyc., 1164 (1904).

It will probably be sufficient for the present purpose simply to cite some of the cases.

National Bank v. *Mathews*, 98 U. S., 621, 629 (1878).

Fritts v. *Palmer*, 132 U. S., 282, 289 (1889).

Seymour v. *Slide & Spur Gold Mints*, 153 U. S., 523, 525 (1894).

Blair v. *Chicago*, 201 U. S., 400, 450 (1906).

Baker v. *Administrator of Backus*, 32 Ill., 79, 110 (1863).

The People v. *North Chicago Ry. Co.*, 88 Ill., 537, 544 (1878).

Bushnell v. *Consolidated Ice Machine Co.*, 138 Ill., 67, 74 (1891).

Coquard v. *National Linseed Oil Co.*, 171 Ill., 480, 484 (1898).

Lincoln Park Chapter, etc. v. *Swateck*, 204 Ill., 228, 232 (1903).

It is also to be said that the record does not contain the charter of the defendant railroad company and so far as appears in the record there is nothing unlawful in its having its principal office in Chicago. While the present laws of Illinois provide that the charters shall show "the place at which shall be established and

maintained the principal business office" of the proposed corporation (Hurd's Rev. Stat. Ill., 1905, Ch. 114, Sec. 3, p. 1565) this has not always been the case and the defendant is acting under a special charter and is not incorporated under the general law. Even assuming that the court has the right to inquire as to whether or not the machinery of the statute was set in motion when the office of the Belleville Company was located in Chicago, there is nothing in the record to show that the principal office was ever lawfully established anywhere else. The record is silent as to whether or not the offices of the Terre Haute Company have ever been anywhere else. (71-72.)

The Belleville Company was incorporated by a special Act of February 14, 1857. (Private Laws of Illinois, 1857, p. 707.) This act was passed before the general law of Illinois for the incorporation of railroad companies went into effect, and the charter does not locate the principal place of business of the company, which may as lawfully be in Chicago as anywhere else in Illinois. The charter is too long to be printed here. The first section is probably the only one which could be claimed to have any bearing on the matter, and is reproduced as follows.

> "Be it enacted by the people of the State of Illinois, represented in the General Assembly, That J. J. Swanwick, H. S. Ozburn, David S. Phillips, John Baird, J. M. Sullivan, W. W. Roman, J. L. Mann and C. A. Keyes, of Perry County; J. L. D. Morrison and P. B. Fouke, of St. Clair County, in this State, and L. W. Ashley and Sidney Breese and their associates in and successors and assigns, are hereby created a body corporate and politic, under and by the name and style of 'The Belleville and Southern Illinois Railroad

Company,' with perpetual succession; and by that name shall be and are hereby made capable, in law and equity, to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity in this State or elsewhere; to make, have and use a common seal, and the same to renew and alter at pleasure; and shall be and are hereby vested with all the powers, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act. And the said company are hereby authorized and empowered to locate, construct and finally complete and put in operation a railroad, from the City of Belleville, in St. Clair County, southwardly, by way of the Village of Pinckneyville, to some point on the Illinois Central railroad, in Perry County, deemed by the said company the most eligible; and for that purpose the company are authorized and empowered, upon the most eligible route, to lay out their railroad, for a single or a double track, to any width, not exceeding one hundred feet, through the whole length; and for the purpose of constructing embankments, may take as much land as may be necessary for the proper construction and security of said railroad."

The obvious intent of the Illinois act above quoted in regard to changing the place of business of a corporation is to provide for the relief of corporations whose charters have located their place of business. The context of the act shows that its whole intent is to change corporate powers and free corporations from charter restrictions. Provision is made, not only for changing the place of business, but for the change of name, object, increasing or decreasing the capital stock, or the number of directors, consolidation of the corporation with other corporations, and the like, all of these things being manifestly a change of corporate powers.

Such an act cannot properly be construed to be intended to affect corporations like the Belleville Company organized under a special act which does not establish their place of business or place any limitations upon the location of their principal offices. The Belleville Company still preserves the freedom of its original charter and may still establish its principal office at any place it sees fit within the State of Illinois without violating its charter and therefore without being required to avail itself of the enabling act allowing the change of place of business, of which railroad corporations incorporated more recently and under the general law of the state are required to avail themselves.

Upon the point that the Belleville & Southern Illinois Railroad Company has not complied with Chap. 32, Sec. 50 of Hurd's Rev. Stat. Ill. (appellant's brief, p. 45) in regard to changing its place of business, it is also to be observed the words "change of place of business" do not necessarily refer to the change of the principal office of the corporation. If, for example, a mining corporation had its mines in Southern Illinois and its principle office in Chicago, a change of place of business might very well mean a change of the place where its mining operations are carried on as distinguished from the place where the corporate meetings are held and the general corporate business transacted. This interpretation would be borne out by the proviso of Section 50:

> "No corporation shall by virtue hereof, change its place of business from any town, county or municipality where such town, county or municipality, or any of the inhabitants thereof, or any

> person or persons interested therein, shall have donated or in any manner contributed any money or other valuable thing to induce such corporation to locate in such town, county or municipality."

This evidently refers to the location of such a thing as a railroad, a factory or other industry, for it can hardly be supposed that the purpose of the proviso would be carried out if the corporation retained its place of corporate meetings and general business in the town which made the donation and might yet move off its railroad, factory or other plant to another town.

It is especially to be observed, however, that the Belleville & Southern Illinois Railroad Company, being incorporated under a special charter, the general legislation of the state in regard to corporations is not to be construed as applying to it.

In *Wincock* v. *Turpin*, 96 Ill., 135, 144 (1880), in reference to a proceeding to wind up a corporation, the court said:

> "This was intended to be a proceeding under the General Incorporation Law. The 25th section of that act provides, that when certain contingencies arise, suits in chancery may be brought by joining the corporation in the suit against all of the stockholders, and each stockholder may be required to pay his *pro rata* share of the debts against the corporation to the extent of the unpaid portion after exhausting the assets of such corporation, etc. But that section only applies to corporations organized under that chapter. It does not apply to or embrace bodies created by special charter. Nor does it in terms embrace liabilities of the character of the claims in this case. Hence that section can have no kind of application to this case.
>
> "If complainant was misled by the case of *Coates*

> v. *Cunningham,* we will say that we decided that case under a misapprehension of the facts. It was supposed that corporation had been organized under a general law, and the proceedings was for unpaid stock. But on inspecting the transcript we find it was created by a special charter. That case is overruled."

Also, in *Union Mutual Life Ins. Co.* v. *Frear Stone Mfg. Co.,* 97 Ill., 537, 545 (1888), in a suit to attempt to enforce stockholders' liability, the court said:

> "The charter of the defendant corporation was granted to it by the General Assembly before the adoption of the present constitution, and, consequently, long before the passage of the general incorporation act, and is not, therefore, affected either by the constitution or the general law on the subject of corporations."

In regard to the position taken by appellant that it is legally impossible for a railroad company to locate its residence at a place which is not on its authorized line of road, no authority is cited for this somewhat unusual proposition, and it is certainly contrary to the very general practice of railroad companies. For example, the Southern Pacific Railway Company is incorporated under the laws of Kentucky and does not own a mile of railroad track in that state. Near the City of Chicago are a number of Belt Lines which at different distances form a circumference of which the City of Chicago is, roughly speaking, the center. These corporations have their principal offices in Chicago and it would certainly be very inconvenient to require them to have their offices anywhere else. Indeed the greater the radius of the circle the more convenient becomes the central location, when it is considered how large a part of the business of a railroad company

must be conducted by mail and telegraph. The principal offices of railroad companies will very probably continue to be located at the place of greatest convenience within the state under whose laws the corporation is organized. To require the principal office of a railroad company always to be located upon its line of railroad would frequently produce the greatest inconvenience without any corresponding public benefit.

THE CONSTRUCTION OF THE ACT OF MARCH 3, 1905 (33 STAT. L., 992) CREATING THE EASTERN DISTRICT OF ILLINOIS.

In regard to the fourth subdivision of appellant's brief (page 50) "That by Sections 14 and 10 of the Act of Congress approved March 3, 1905, creating the Eastern District of Illinois, the Circuit Court of said District was given jurisdiction of all causes in which the defendant is found within the District," the attention of the court is called to the fact that the assignment of errors does not cover this point (Printed Record, 78.) The right to an assignment of errors is statutory. (Rev. Stat., Sec. 997; 1 U. S. Comp. Sta., 1901, p. 712.) It is provided by Rule 21, Section 4, that "when there is no assignment of errors, as required by Sec. 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified."

> "The assignment of errors, being, as thus seen, essential to the allowance of an appeal or the granting of a writ of error, becomes an import-

ant part of the record, and it is one of the things upon which the trial court acts in granting the writ or allowing the appeal. It is plain, therefore, that such assignment constitutes an essential part of the record to be presented to this court, and it cannot be superseded by a subsequent assignment of errors,—certainly not by one filed without leave of the court."

Lloyd v. *Chapman,* 93 Fed. Rep., 599, 600, C. C. A., 9th Cir., 1899.

"The complaint made on behalf of some of the appellants on account of the computation of interest upon the claims of the creditors was not made the subject of an assignment of error, and is therefore not considered."

George v. *Wallace,* 135 Fed. Rep., 286; 68 C. C. A., 40, 49 (8th Circuit, 1904).

Without intending to waive the position that error has not been assigned upon this point, appellee makes the following argument to be considered only in case the court shall hold that the point is open for consideration and is covered by the assignment of errors.

The case of *Petri* v. *Creelman Lumber Co.,* 199 U. S., 487 (1905) turns upon the fact that the defendants resided in different districts of the state, while in the case at bar each of the defendants served has pleaded residence in the Northern Division of the Northern District of Illinois. Under the provision of the Act of March 3, 1905, establishing the Eastern District of Illinois (33 Stat. L., 992) it is provided by the 14th Section that the courts and judges of the Eastern District of Illinois shall possess the same jurisdiction and powers, civil, criminal, equitable, or otherwise, and perform the same duties as are performed by the Circuit

and District Courts and judges of the United States of the Southern District of Illinois, it being provided in the second paragraph of Section 10, that "When the defendant is a non-resident of the district, action may be brought in either division of said district wherein the defendant may be found." It, therefore, follows, argues the appellant, that the provision just quoted applies also to the Eastern District.

It is to be observed, however, that by Section 10 of this act the Southern District of Illinois is divided into two Divisions while by Section 12 of the act the Eastern District of Illinois is not divided. The provision that when the defendant is a non-resident of the district, action may be brought in either Division of the district is significantly omitted in the establishment of the Eastern District, and obviously has no application to a district which is not divided.

Assuming, however, that the passage quoted is applicable to the Eastern District, it is suggested that this passage refers to suits which the plaintiff has already a right to bring against the defendant, for example, those of a local nature, and to cases where the defendants reside in different districts of the state, and is simply intended to relieve the embarrassment of the queston in which Division to sue. It is undesirable by interpretation to multiply exceptions to the general laws of the United States in relation to venue, and a departure from the general plan should not be inferred except from plain and clear language.

It is stated by appellant in his brief, page 52:

> "In the present case all three defendants, railroad companies, were found and served, in the Eastern District of Illinois," &c.

So far as the Illinois Central Railroad Company, no question is raised that if it was to be sued alone, suit should be brought in the district where its principal office is situated, in the Northern Division of the Northern District of Illinois. No effort is made in the record to show that it was suable elsewhere. As to that company cross-examination was waived. (74.) In case of Belleville and Terre Haute companies, the marshal's return (53) is that he delivered a copy of the subpoena to W. K. Murphy, as director of the said companies, at Pinckneyville, Illinois. It appears from the record that the two defendants have no offices, except at Chicago, and are not transacting business anywhere else. Under these circumstances the mere serving of a director at Pinckneyville would not cause the corporations to be "found" in the district in which Pinckneyville is situated.

Goldey v. *Morning News,* 156 U. S., 518, 522 (1895, service on president).

Conley v. *Mathieson Alkali Works,* 190 U. S., 406, 411 (1903, service on director).

Caledonian Coal Co. v. *Baker,* 196 U. S., 432, 444 (1904, service on president).

Reilly v. *Philadelphia & R. Ry. Co.,* 109 Fed. Rep., 349, 350 (1901, service on director).

Eldred v. *American Palace Car Co. of N. J.,* 103 Fed. Rep., 209, 210 (1900, service on director).

Same case on Appeal, 105 Fed. Reptr., 457 (C. C. A., 3rd Cir., 1900).

Respectfully submitted,

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